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INVITATION TO COMMENT

CACI 10-03

Title
Civil Jury Instructions (CACI) Revisions

Proposed Revisions
Add and revise jury instructions

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair

Action Requested
Review and submit comments by October 8, 2010

Proposed Effective Date
December 14, 2010

Contact
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Summary

New and revised instructions and verdict forms reflecting recent developments in the law; proposed new series on construction law.

CIVIL JURY INSTRUCTIONS (CACI 10–03)
TABLE OF CONTENTS

361. Plaintiff May Not Recover Duplicate Contract and Tort Damages

[*Name of plaintiff*] has made claims against [*name of defendant*] for breach of contract and [*insert tort action*]. If you decide that [*name of plaintiff*] has proved both claims, the same damages that resulted from both claims can be awarded only once.

New September 2003; Revised December 2010

Directions for Use

This instruction may be used only with a general verdict. (See *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360–361 [-- Cal.Rptr.3d --].) For an instruction to be used with a special verdict and special verdict form, see CACI No. 3934, *Damages on Multiple Legal Theories*, and CACI No. VF-3920.

If the issue of punitive damages is not bifurcated, read the following instruction: "You may consider awarding punitive damages only if [*name of plaintiff*] proves [his/her/its] claim for [*insert tort action*]."

Sources and Authority

- "Here the jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence, and that punitive damages could be assessed if defendant committed a tort with malice or intent to oppress plaintiffs, but that such damages could not be allowed in an action based on breach of contract, even though the breach was wilful." (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337 [5 Cal.Rptr. 686, 353 P.2d 294].)

- "Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories, and the jury should be so instructed. Here, the court did not specifically instruct that damages could be awarded on only one theory, but did direct that punitive damages could be awarded only if the jury first determined that appellant had proved his tort action." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 761, fn. 13 [250 Cal.Rptr. 195], internal citation omitted.)

- "The trial court would have been better advised to make an explicit instruction that duplicate damages could not be awarded. Indeed, it had a duty to do so." (*Dubarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 16 [282 Cal.Rptr. 181], internal citation omitted.)

- "The trial court instructed the jury, with CACI No. 361, that [plaintiff] could not be awarded duplicative damages on different counts, thus suggesting that it was the jury's responsibility to avoid awarding duplicative damages. But neither the instructions nor the special verdict form told the jury how to avoid awarding duplicative damages. With a single general verdict or a general verdict with special findings, where the verdict includes a total damages award, the jury presumably will follow

the instruction (such as the one given here) and ensure that the total damages award includes no duplicative amounts. A special verdict on multiple counts, however, is different. If the jury finds the amount of damages separately for each count and does not calculate the total damages award, as here, the jury has no opportunity to eliminate any duplicative amounts in calculating the total award. Absent any instruction specifically informing the jury how to properly avoid awarding duplicative damages, it might have attempted to do so by finding no liability or no damages on certain counts, resulting in an inconsistent verdict." (*Singh*, *supra*, 186 Cal.App.4th at p. 360.)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.06

Preliminary Draft Only—Not Approved by Judicial Council

NOTE: The proposed changes to this verdict form would be made to all verdict forms.

VF-300. Breach of Contract

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did all the conditions occur that were required for [*name of defendant*]'s performance?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of plaintiff*] harmed by that failure?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff***]'s damages?**

[a. Past [economic] loss [including [*insert descriptions of claimed damages***]]:**

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages***]]:**

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], ~~deliver this verdict form to~~notify the [clerk/bailiff/ court attendant ~~judge~~] that you are ready to present your verdict in the courtroom.

New April 2004; Revised December 2010

Directions for Use

If the verdict form used combines other causes of action involving both economic and non-economic damages, use "economic" in question 7.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow. If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change question 5 to the following: "Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?"

If specificity is not required, users do not have to itemize the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, the damages tables should all be replaced with CACI No. VF-3920, *Damages on Multiple Causes of Action*.

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, ~~you must first decide~~the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. It does not matter whether [***name of defendant***] exercised the right to control. ~~If you decide that the right to control existed, then [***name of agent***] was [***name of defendant***]'s employee.~~**

~~If you decide that [*name of defendant***] did not have~~In addition to the right of control, ~~then~~ you must also consider all of the circumstances in deciding whether [***name of agent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of agent***] was the employee of [***name of defendant***]:**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(d) **[***Name of defendant***] had an unlimited right to end the relationship with [***name of agent***];**

(e) **The work being done by [***name of agent***] was ~~the~~ [his/her] only occupation or business ~~of [***name of agent***]~~;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; and**

(i) **[***Name of defendant***] and [***name of agent***] acted as if they had an employer-employee relationship.**

New September 2003; Revised December 2010

Directions for Use

Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restement Second of Agency, section 220. They have been phrased in a way to suggest whether or not they point toward an employment relationship.

Sources and Authority

- Civil Code section 2295 provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

- "Following common law tradition, California decisions … declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired … .' [¶] However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 [256 Cal.Rptr. 543,469 P.2d 399], internal citations omitted.)

- "Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 351, internal citations omitted.)

- [T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the

degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at pp. 354–355, internal cross reference omitted.)

- "Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297 fn. 4 [-- Cal.Rptr.3d --]~~The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted~~.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 403.)

- ~~One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)~~

- ~~An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)~~

- "~~Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. ...~~ It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz &*

Co. (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

- ~~The factors that may be considered in determining whether an agency exists are drawn from the~~ Restatement Second of Agency, section 220, provides~~and are phrased therein as follows~~:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

- ~~These factors have been cited with approval by the Supreme Court. (*Malloy, supra*, 37 Cal.2d at pp. 370-371.) As phrased in the Restatement, they do not indicate in whose favor each factor weighs. The draft instruction states the factors in a way to suggest whether or not they point toward an employment relationship.~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2–42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:5–3:6

3934. Damages on Multiple Legal Theories

In this case, [*name of plaintiff***] seeks damages from [***name of defendant***] under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged.**

You will be asked to decide whether [*name of defendant***] is liable to [***name of plaintiff***] under the following legal theories [***list***]:**

1. [*e.g., breach of employment contract*];
2. [*e.g., wrongful termination in violation of public policy*];
3. [*continue*].

The following items of damages are recoverable only once under all of the above legal theories:

1. [*e.g., lost past income*];
2. [*e.g., medical expenses*];
3. [*continue*].

[The following additional items of damages are recoverable only once for [*specify legal theories***]:**

1. [*e.g.,emotional distress*];
2. [*continue*].

[*Continue until all items of damages recoverable under any legal theory have been listed.***]]**

New December 2010

Directions for Use

This instruction is to guide the jury in awarding damages in a case involving multiple claims, causes of action, or counts in which different damages are recoverable under different legal theories. It should be used with CACI No. VF-3920, *Damages on Multiple Causes of Action*.

This instruction and verdict form are designed to avoid the problem of juror confusion over how to fill out the damages table or tables when multiple causes of action are to be decided and the potential damages are different on different causes of action. (See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 701–705 [101 Cal.Rptr.3d 773, 219 P.3d 749].) It is not necessary to give this instruction if the same damages are recoverable on all causes of action, although giving only the opening paragraph might

be appropriate.

First list all of the legal theories or causes of action that the jury must address. Then list the items of damages recoverable under all of the theories. Then list the additional damages that may be awarded on each of the other causes of action. Each item of damages should be listed somewhere, but only once.

If there are multiple plaintiffs with different claims for different damages, repeat the entire instruction for each plaintiff except for the opening paragraph.

Often, it will be necessary to identify items of damages with considerable specificity. For example, instead of just "emotional distress," it may be necessary to specify "emotional distress suffered before termination of employment due to harassment" and "additional emotional distress suffered due to the termination of employment."

Sources and Authority

- "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] … [¶] In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (*Roby, supra*, 47 Cal.4th at p. 702.)

- "As for the Court of Appeal's statement that under the instructions plaintiff was entitled to recover the same amount of damages under any of plaintiff's various theories, we have reviewed the instructions and none of them would preclude a finding of differing amounts of damage for each theory of recovery. Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being defamed by defendants would be identical to the damages he incurred from being ousted from [the] board of directors. … [T]hese theories of recovery seem based on different 'primary' rights and duties of the parties." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158 [17 Cal.Rptr.2d 608, 847 P.2d 574.)

- "The trial court instructed the jury … that [plaintiff] could not be awarded duplicative damages on different counts, thus suggesting that it was the jury's responsibility to avoid awarding duplicative damages. But neither the instructions nor the special verdict form told the jury how to avoid awarding duplicative damages. With a single general verdict or a general verdict with special findings, where the verdict includes a total damages award, the jury presumably will follow the instruction (such as the one given here) and ensure that the total damages award includes no duplicative amounts. A special verdict on multiple counts, however, is different. If the jury finds the amount of damages separately for each count and does not calculate the total damages award, as here, the jury has no opportunity to eliminate any duplicative amounts in calculating the total award. Absent any instruction specifically informing the jury how to properly avoid awarding duplicative damages, it might have attempted to do so by finding no liability or no damages on certain counts, resulting in an inconsistent verdict." (*Singh v. Southland Stone, U.S.A. Inc.* (2010)

186 Cal.App.4th 338, 360 [-- Cal.Rptr.3d --].)

- "A special verdict must present the jury's conclusions of facts, 'and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' In our view, a special verdict on multiple counts should include factual findings identifying any duplicative amounts, or a finding as to the total amount of damages eliminating any duplicative amounts, so as to allow the trial court to avoid awarding duplicative damages in the judgment." (*Singh, supra*, 186 Cal.App.4th at p. 360, internal citation omitted.)

- " 'In California the phrase "cause of action" is often used indiscriminately … to mean counts which state [according to different legal theories] the same cause of action … .' But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. … '[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief." [Citations.]' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798 [--Cal.Rptr.3d --, -- P.3d --], internal citations omitted.)

Secondary Sources

VF-3920. Damages on Multiple Legal Theories

What are [*name of plaintiff***]'s damages? [***List each item of damages listed in CACI No. 3934.*]

1. **[***e.g., Economic Damages: lost past earnings***]**

$_____

2. **[***e.g., Economic Damages: past medical expenses*]

$_____

3. **[***e.g., Economic Damages: lost future earnings***]**

$_____

4. **[***e.g., Economic Damages: future medical expenses***]**

$_____

5. **[***e.g., Past noneconomic loss including [physical pain/mental suffering***]**

$_____

6. **[***e.g., Future noneconomic loss including [physical pain/mental suffering***]**

$_____

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New December 2010

Directions for Use

This verdict form is for use with CACI No. 3934, *Damages on Multiple Causes of Action*. Together they are designed to avoid the problem of the jury's awarding the same damages under different causes of action or failing to distinguish sufficiently what damages are being awarded under what legal theory.

If multiple causes of action are at issue, use this verdict form instead of the damages tables in each separate verdict form. If multiple verdict forms will be combined, delete all damages tables and

incorporate this verdict form instead.

List each item of damages identified in CACI No. 3934. Include each item only once regardless of the number of claims under which the item may be recovered. If desired, reference may be made to the claims under which the item is recoverable. For example, lost past earnings might be "recoverable under all claims," but noneconomic damages for metal suffering might be "recoverable only under the claim for bad-faith breach of insurance contract."

Often, it will be necessary to identify items of damages with considerable specificity. For example, instead of just "emotional distress," it may be necessary to specify "emotional distress suffered before termination of employment due to harassment" and "additional emotional distress suffered due to the termination of employment." (See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 701–705 [101 Cal.Rptr.3d 773, 219 P.3d 749].)

4500. Breach of Implied Warranty of Correctness of Plans and Specifications—Essential Factual Elements

---

[*Name of plaintiff*] **claims that** [*name of defendant*] **provided plans and specifications for the** [**project***/describe construction project, e.g., kitchen remodeling*] **that were not correct. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] **provided** [*name of plaintiff*] **with plans and specifications for** [*name of defendant*]**'s** [*short name for project, e.g., remodeling*] **project;**

2. **That** [*name of plaintiff*] **was required to follow the plans and specifications provided** by [*name of defendant*] **in** [**bidding on [and] constructing**] **the** [*e.g., remodeling*] **project;**

3. **That** [*name of plaintiff*] **reasonably relied on the plans and specifications for the** [*e.g., remodeling*] **project;**

4. **That the plans and/or specifications provided by** [*name of defendant*] **were not correct; and**

5. **That** [*name of plaintiff*] **was harmed because the plans or specifications were not correct.**

New December 2010

Directions for Use

This instruction should be given when a contractor makes a claim for breach of the implied warranty of correctness on the grounds that the plans and specifications provided by the owner for its construction project were not correct. Uncontested elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements* for other contested elements of a breach-of-contract claim.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This implied warranty also applies to a general contractor who is responsible for the correctness of plans and specifications that are provided to subcontractors, (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550 [59 Cal.Rptr. 752].)

An implied-warranty claim can arise when the contractor is required to rely on the owner's plans and specifications in preparing a fixed price bid for a project. A claim can also arise when the contractor must follow the owner's plans and specifications, and as a result, encounters difficulty in constructing the project. In either case, the contractor may assert a claim for breach of the implied warranty if the contractor is damaged by incorrect plans or specifications.

A breach of the implied warranty can also be asserted as an affirmative defense to an owner's claim for nonperformance (see CACI No. 4511, *Affirmative Defense—Contractor Followed Plans and Specifications.*), if the contractor's alleged breach was caused by the owner's incorrect plans and specifications.

The implied warranty applies in particular to plans and specifications provided by public owners, who are required by statute to prepare accurate and complete plans and specification for public works projects. (See Public Contract Code, §§ 1104, 10120.) It can also apply to private construction projects if the owner requires the contractor to follow the plans and specifications that turn out to be incorrect. (See, e.g., *Coleman Engineering Co. v. North American Aviation, Inc*. (1966) 65 Cal.2d 396, 404 [420 P.2d 713, 55 Cal.Rptr. 1].)

An owner's obligation to provide correct plans and specifications cannot be disclaimed by general language requiring the contractor to examine the plans and specifications for errors and omissions. (See *Warner Constr. Corp. v. L.A.*, 2 Cal.3d 285, 292 [466 P.2d 996, 85 Cal.Rptr. 444].)

Sources and Authority

- Public Contract Code section 1104 (applicable to local government agencies) provides: "No local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects. Nothing in this section shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder to review architectural or engineering plans and specifications prior to submission of a bid, and report any errors and omissions noted by the contractor to the architect or owner. The review by the contractor shall be confined to the contractor's capacity as a contractor, and not as a licensed design professional."

- Public Contract Code section 10120 (applicable to state agencies) provides: "Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent mechanic or other builder to carry them out."

- "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work…[T]he insertion of the articles prescribing the [specifications] imported a warranty that if the specifications were complied with, the [project] would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance." (*United States v. Spearin* (1918) 248 U.S. 132, 136–137 [54 Ct.Cl. 187, 39 S.Ct. 59, 63 L.Ed. 166].)

- "A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented. This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable." (*Souza & McCue Constr. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510–511 [370 P.2d 338, 20 Cal.Rptr. 634], internal citations omitted.)

- "We have long recognized that '[a] contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented.' " (*Los Angeles Unified School District v. Great American Ins. Co.* (2010) 49 Cal 4th 739, 744 [-- Cal.Rptr.3d --, -- P.3d --].)

- The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications "is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work … ." (*E. H. Morrill Co. v. State* (1967) 65 Cal.2d 787, 793 [423 P.2d 551, 56 Cal.Rptr. 479], internal citations omitted.)

- "If a contractor makes a misinformed bid because a public entity issued incorrect plans and specifications, precedent establishes that the contractor can sue for breach of the implied warranty that the plans and specifications are correct. The contractor may recover 'for extra work or expenses necessitated by the conditions being other than as represented.' " (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1401 fn. 5 [106 Cal.Rptr.3d 691].)

- "Courts have recognized a cause of action in contract against a public entity based upon the theory that 'the furnishing of misleading plans and specifications by the public body constitutes a breach of implied warranty of their correctness.' " (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 551 [66 Cal.Rptr.3d 175].)

- "Second, [private owner] breached its contract by providing [contractor] with plans that were both erroneous and extremely late in issuance. Although construction started on May 1, 1976, lengthy drawing reviews became necessary and final drawings were still being furnished as late as July through September 1977. The furnishing of misleading plans and specifications by an owner is a breach of an implied warranty of their correctness." *(C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 643 [218 Cal.Rptr. 592], internal citations omitted.)

- "The trial court … read the section 158 disclaimer to the jury, but instructed them that 'if a public agency makes a positive and material representation as to a condition

presumably within the knowledge of the agency and upon which the plaintiff had a right to rely, the agency is deemed to have warranted such facts despite a general provision requiring an on-site inspection by the contractor.' In submitting the issue of the effect of the section 158 disclaimer to the jury, and its instructions to the jury, the trial court complied with our decision in *Morrill,* and the verdict must be taken as resolving that issue against defendant." (*Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 292 fn. 2 [466 P.2d 996, 85 Cal.Rptr. 444].)

- "Since the plans and specifications were prepared by the owners' architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with his specific proposal, we cannot reasonably conclude that the subcontractor assumed responsibility for the adequacy of the plans and specifications … The language upon which the plaintiff relies constituted a statement of the purpose sought to be achieved by means of the owners' plans and specifications rather than an undertaking on the part of the subcontractor of responsibility for the adequacy of such plans and specifications as the design of a system capable of producing the desired result." (*Kurland v. United Pacific Ins. Co.* (1967) 251 Cal.App.2d 112, 117 [59 Cal.Rptr. 258].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 998

10 Miller & Starr, California Real Estate (Thomson West) (3d ed. 2001) § 27:25.

5 Construction Law, (Matthew Bender) (2007) Ch. 18, Warranties, § 18.02

Gibbs & Hunt, California Construction Law (Aspen Pub.) (16th ed. 1999), § 4.06.

Allensworth, Construction Law, (American Bar Association) (2009), § 3.04

Acret, California Construction Law Manual, (Bancroft Whitney??) (6th ed. 2005), § 7:12

Kamine, Public Works Construction Manual (BNI Publications, Inc.) (1996)

4501. Owner's Liability for Failing to Disclose Important Information Regarding a Construction Project—Essential Factual Elements

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[*Name of plaintiff***] claims that** [**he/she/it**] **was harmed because [***name of defendant***] failed to disclose important information regarding [***specify information that defendant failed to disclose or concealed, e.g. tidal conditions at the project site***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] submitted [his/her/its] bid or agreed to perform without information regarding [***e.g., tidal conditions***] that materially affected performance costs;**

2. **That [***name of defendant***] had this information, and was aware that [***name of plaintiff***] did not know it and had no reason to obtain it;**

3. **That [***name of defendant***] failed to provide this information;**

4. **That the contract plans and specifications or other information furnished by [***name of defendant***] to [***name of plaintiff***] misled [***name of plaintiff***] or did not put [him/her/it] on notice to investigate further;**

5. **That [***name of plaintiff***] was harmed because of [***name of defendant***]'s failure to disclose the information.**

[*Name of plaintiff***] does not have to prove that [***name of defendant***] intended to conceal the information.**

New December 2010

Directions for Use

Give this instruction if a contractor claims that the owner had important information regarding the project that it failed to disclose, and as a result, the contractor incurred greater costs than anticipated. Undisputed elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements* for other contested elements of a breach-of-contract claim.

With regard to undisclosed information, there is liability only if the failure to disclose materially affected the cost of performance and actually and justifiably misled the contractor in bidding the contract. It is not necessary to show a fraudulent intent to conceal. (See *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 745 [-- Cal.Rptr.3d --, -- P.3d --].)

This instruction applies principally to public owners awarding fixed price construction contracts to contractors required to submit bids based on information provided by the public owner. Government Code section 818.8 relieves public owners from tort liability for concealment and

similar tortious conduct. However, public owners remain liable in contract. (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444, 466 P.2d 996].) Private owners remain liable in tort for concealment of important facts. (See CACI No. 1901, *Concealment*.)

Sources and Authority

- "[A] contractor need not prove an affirmative fraudulent intent to conceal. Rather … a public entity may be required to provide extra compensation if it knew, but failed to disclose, material facts that would affect the contractor's bid or performance. Because public entities do not insure contractors against their own negligence, relief for nondisclosure is appropriate only when (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information." (*Los Angeles Unified School Dist., supra,* 49 Cal.4th at p. 745.)

- "The circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders, and any unwarranted assumptions made by the contractor. The public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance." (*Los Angeles Unified School Dist., supra,* 49 Cal.4th at p. 754.)

- "[E]stablished law provides public entities substantial protection against careless bidding practices by contractors and forecloses the possibility that a public entity will be held liable when a contractor's own lack of diligence prevented it from fully appreciating the costs of performance. This being so, protection against careless bidding practices does not require that we allow contractors damaged by a public entity's misleading nondisclosure to recover only on a showing the public entity harbored a fraudulent intent." (*Los Angeles Unified School Dist., supra,* 49 Cal.4th at p. 752.)

- "Nondisclosure is actionable … only if the information at issue materially affects the cost of performance … ." (*Los Angeles Unified School Dist., supra,* 49 Cal.4th at p. 753.)

- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably

discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Constr. Corp., supra,* 2 Cal.3d at p. 294, footnotes omitted.)

- "But this does not mean … that City could be liable simply by failing to supply complete plans and specifications. It does mean that careless failure to disclose information may form the basis for an implied warranty claim if the defendant possesses superior knowledge inaccessible to the contractor or where that which was disclosed is likely to mislead in the absence of the undisclosed information….Thus, … the general rule [is] that silence alone is not actionable." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 552, [66 Cal.Rptr.3d 175], internal citations omitted.)

- "It would be inequitable to permit defendant to enforce the literal terms of the contract which called for the excavation of 'all materials' necessary to complete the job when plaintiffs were induced by defendant's misrepresentation to submit a bid which was much lower than was warranted by the true facts. If instead of stating in the specifications that [contractor] would excavate to rough grade, defendant had stated the true facts of which it had knowledge -- that [contractor] was obligated by contract to excavate no lower than five feet above grade -- the present situation would not have arisen. Having failed to impart this knowledge to plaintiffs and having willfully or carelessly misrepresented the true situation, defendant is obligated to plaintiffs for the additional work occasioned." (*Gogo v. L.A. etc. Flood Control Dist.* (1941) 45 Cal.App.2d 334, 341–342 [114 P.2d 65].)

- "It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions. [¶] In a factually similar case, the contractor encountered 'unusual quantities of quicksand and extensive subsoil water conditions which had not been shown on the plans or specifications … information as to which, although known to it, had been withheld by the city.' An award of damages was affirmed because … ' [t]he withholding by the city of its knowledge…resulting in excessive cost of construction, forms actionable basis for plaintiff's claim for damages.' " (*Salinas v. Souza & McCue Constr. Co. (*1967) 66 Cal.2d 217, 222–223 [57 Cal.Rptr. 337, 424 P.2d 921], internal citations omitted.)

- "Here, the city argues that provisions in the contract specifications requiring that the bidders 'examine carefully the site of the work,' and stating that it is 'mutually agreed that the submission of a proposal shall be considered prima facie evidence that the bidder has made such examination,' prevents a holding that the city is liable for the consequences of its fraudulent representation. However, even if the language had specifically directed the bidders to examine *subsoil* conditions, which it did not, it is clear that such general provisions cannot excuse a governmental agency for its active concealment of conditions." (*Salinas, supra,* 66 Cal.2d at p. 223, internal citations omitted.)

- "A fraudulent concealment often comprises the basis for an action in tort, but tort actions

for misrepresentation against public agencies are barred by Government Code section 818.8. Plaintiff retains, however, a cause of action in contract. 'It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions.' As explained in *Souza & McCue Construction Co. v. Superior Court, …* 'This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable.' " (*Warner Construction Corp., supra*, 2 Cal.3d at p. 294, internal citations omitted.)

- "Under general principles of contract and tort law, a party who conceals or fails to disclose material information to another is liable for fraud. In the public construction contract context, however, the conduct of a public agency which would otherwise amount to a tortuous misrepresentation is treated as a breach of contract. The underlying theory is that providing misleading plans and specifications constitutes a breach of the implied warranty of correctness. (*Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 55 [83 Cal.Rptr.2d 590].)

- "When there is no misrepresentation of factual matters within the state's knowledge or withholding of material information, and when both parties have equal access to information as to the nature of the tests which resulted in the state's findings, the contractor may not claim in the face of a pertinent disclaimer that the presentation of the information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found." (*Wunderlich v. State of California* (1967) 65 Cal.2d 777, 786-787 [423 P.2d 545, 56 Cal.Rptr. 473].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 998

10 Miller & Starr California Real Estate (Thomson West) (3d ed. 2001) § 27:25

5 Construction Law (2007) Ch. 18, Warranties, § 18.02 (Matthew Bender)

Gibbs & Hunt, California Construction Law (Aspen Pub.) (16th ed. 1999), § 4.06

Allensworth, Construction Law, (American Bar Association) (2009), § 3.04

Acret, California Construction Law Manual, (Bancroft Whitney?) (5th ed. 1997), § 7:12

Kamine, Public Works Construction Manual (BNI Publications, Inc.) (1996), p. 99-100.

4502. Breach of Implied Covenant to Provide Necessary Items Within Owner's Control—Essential Factual Elements

In every construction contract, it is understood that the owner will provide access to the project site, and do those things within the owner's control that are necessary for the contractor to reasonably and timely perform its work. [*Name of plaintiff***] claims that [***name of defendant***] breached the contract by [***specify what owner failed to do, e.g., failing to procure a disposal permit for hazardous materials***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] could not reasonably or timely perform [his/her/its] work without [***insert short name for item, e.g., a disposal permit***];**

2. **That [***name of defendant***] knew or reasonably should have known that [***e.g., a disposal permit***] was necessary for [***name of plaintiff***] to reasonably and timely perform the work;**

3. **That [***name of defendant***] had the ability to [***e.g., procure a disposal permit***];**

4. **That [***name of plaintiff***] could not obtain [***e.g., a disposal permit***] without [***name of defendant***]'s assistance;**

5. **That [***name of defendant***] failed to [***e.g., procure a disposal permit***] in a timely manner;**

6. **That [***name of plaintiff***] was harmed by [***name of defendant's***] failure.**

New December 2010

Directions for Use

This instruction should be used when a contractor claims the owner breached an implied covenant to provide access to the project site, easements, permits, or other things uniquely within the owner's control, which were necessary for the contractor to reasonably and timely perform the contract. Undisputed elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements* for other contested elements of a breach-of-contract claim.

This implied covenant can arise in both private and public contracts unless expressly precluded by the contract documents. (See *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82 [268 P.2d 12] [covenant is implied in every construction contract]; see also *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613 [220 P.2d 729] [covenant implied in private contract].) This instruction may also be used when the contractor claims the owner breached a general duty of cooperation by failing to control and/or coordinate third parties, such as other contractors on the project site.

This instruction is based on CACI 325, *Breach of the Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

Sources and Authority

- Civil Code section 1655 provides: "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

- Civil Code section 1656 provides: "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

- "In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract and a failure to observe them not consented to by the contractor constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance." (*Gray v. Bekins* (1921) 186 Cal. 389, 395 [199 P. 767], internal citations omitted.)

- "Under the contract as thus construed, there was an implied covenant that plaintiffs would be given possession of the premises for the agreed purpose at a reasonable time to be chosen by them. Defendant's conduct in forbidding plaintiffs to enter, therefore, was sufficient not only to excuse their performance but also to constitute a breach or anticipatory breach of the contract." (*Bomberger*, *supra,* 35 Cal.2d at p. 613, internal citations omitted.)

- "The rule is plain that in every construction contract the law implies a covenant, where necessary, that the owner will furnish the selected site of operations to the contractor in order to enable him 'to adequately carry on the construction and complete the work agreed upon.' The rule applies with equal force to construction contracts entered into by a municipality." (*Hensler, supra,* 124 Cal.App.2d at pp. 82–83, internal citations omitted.)

- "In general, where plans, specifications and conditions of contract do not otherwise provide, there is an implied covenant that the owner of the project is required to furnish whatever easements, permits or other documentation are reasonably required for the construction to proceed in an orderly manner." (*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920 [136 Cal.Rptr. 890].)

- "The rule is well settled that in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate

performance of work. When necessary permits relating to the project are not available or access to the site is limited by the owner, the implied covenant is breached. The trial court found the delays were caused by the [defendant]'s breaches of contract and implied covenant in failing to disclose known restrictions on project performance, to obtain necessary permits, and to provide timely access to perform the work." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 50 [83 Cal.Rptr.2d 590], internal citations omitted.)

- "[A] contract includes not only the terms that have been expressly stated but those implied provisions indispensable to effectuate the intention of the parties. … Clearly an implied term of the contract herein was that once the notice to proceed was issued, the dredge would be available for work on the project…[Plaintiff], acting as a reasonable public works contractor, was misled by this incorrect implied representation in its submission of a bid. [Plaintiff] justifiably relied on this representation in determining the cost of constructing the seawall. Accordingly, it did not include in its bid the cost of maintaining the seawall for an indefinite period of time while awaiting the arrival of the dredge. As the [defendant] impliedly warranted the correctness of these representations, it is liable for the cost of extra work which was necessitated by the dredge's failure to arrive." (*Tonkin Constr. Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828, 832 [233 Cal.Rptr. 587], internal citations omitted.)

- " '[T]he covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.'" (*Racine & Laramie, Ltd. v. Department of Parks and Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § ____

10 Miller & Starr California Real Estate (Thomson West) (3d ed. 2001) § _____

5 Construction Law (2007) Ch. 18, Warranties, § 18.___ (Matthew Bender)

Gibbs & Hunt, California Construction Law (Aspen Pub.) (16th ed. 1999), § 4.06

Allensworth, Construction Law, (American Bar Association) (2009), § 3.04

Acret, California Construction Law Manual, (Bancroft Whitney?) (5th ed. 1997), § 7:12

Kamine, Public Works Construction Manual (BNI Publications, Inc.) (1996), p. 100

4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] failed [to perform the work for the [project/***describe construction project, e.g., kitchen remodeling***] competently/ [or] to use the proper materials for the [project/** *e.g., kitchen remodeling***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [failed to perform [his/her/its] work competently/ [or] failed to provide the proper materials] by [***describe alleged breach, e.g., failing to apply sufficient coats of paint or failing to complete the project in substantial conformity with the plans and specifications***]; and**

2. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010

Directions for Use

This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result achieved the owner's expectations. This is sometimes referred to as the implied covenant that the work performed will be fit and proper for its intended use. (See *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].) The implied covenant encompasses the quality of both the work and materials. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582–583 [12 Cal.Rptr. 257, 360 P.2d 897], overruled on other grounds in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132.)

Uncontested elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This instruction is based on CACI No. 325, *Breach of the Covenant of Good Faith and Fair Dealing—Essential Factual Elements*. It should be given in conjunction with CACI No. 4531, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract*, which provides the proper measure of damages recoverable for a breach of the implied covenant to perform work fit for its intended use.

Sources and Authority

- "[A]lthough [general contractor] … had a contractual relationship with the City, it also had a duty of care to perform in a competent manner." (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)

- "The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of

the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself." (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superceded by statute as stated in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal.Rptr.3d 5].)

- "[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner." (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)

- " 'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." (*Kuitems, supra,* 104 Cal.App.2d at p. 485.)

- "Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use' … ." (*Kuitems, supra,*104 Cal.App.2d at p. 485.)

- "[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner … ." (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)

- "[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction. Clearly, it would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction. (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)

- "Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. … The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and

material. With respect to sales, merchantability requires among other things that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability." (*Aced, supra*, 55 Cal.2d at pp. 582–583, internal citations omitted.)

- "[P]ublic policy imposes on contractors in various circumstances the duty to finish a project with diligence and to avoid injury to the person or property of third parties." (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1450 [37 Cal.Rptr.2d 790].)

Secondary Sources

Steven G.M. Stein, *Construction Law*, (Vol. 2) 5B.01[2][b]

11 Miller & Starr, *California Real Estate* (3d ed. 2001) §§ 29:5, 29.18

1 Cal. Construction Contracts and Disputes (Cont.Ed.Bar 2d ed. 2005) § 6.8

4511. Affirmative Defense – Contractor Followed Plans and Specifications

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[*Name of plaintiff***] claims that [***name of defendant***] failed to [perform the work for the [project/***describe construction project, e.g., kitchen remodeling***] competently/ [or] use the proper materials for the [project/** *e.g., kitchen remodeling***]]. [***Name of defendant***] claims that [he/she/it] followed the plans and specifications and that [***specify alleged defect in the work or materials***] was because of the plans and specifications that [***name of plaintiff***] provided to [***name of defendant***] for the project.**

In order to prevail on this defense, [*name of defendant***] must prove all the following:**

1. **That [***name of plaintiff***] provided [***name of defendant***] with the plans and specifications for the project;**

2. **That [***name of plaintiff***] required [***name of defendant***] to follow the plans and specifications in constructing the project;**

3. **That [***name of defendant***] substantially complied with the plans and specifications that [***name of plaintiff***] provided for the project;**

4. **That [***specify alleged defect in the work and/or deficiency in performance***] was because of [***name of defendant's***] use of the plans and specifications.**

New December 2010

Directions for Use

This instruction is a contractor's affirmative defense to the owner's claims that there is a defect in the work or deficiency in the contractor's performance. (See CACI No. 4510, *Breach of Implied Covenant to Perform Work in a Good and Competent Manner —Essential Factual Elements*.) The contractor asserts that any alleged defect or deficient performance was caused by following the plans and specifications that were provided by the owner because the plans and specifications were inaccurate or incomplete. This instruction may be modified for use in the contractor's action for compensation from the owner if the owner alleges poor quality work as a defense to payment.

Sources and Authority

- "[T]he authorities hold that where the plans and specifications were prepared by the owner's architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with the specific proposal, it cannot reasonably be concluded that the subcontractor assumed responsibility for the adequacy of the plans and specifications to meet the purpose of the owner, and where the contractor faithfully performs the work as specified, there cannot be an implied warranty that the contractor will supplement the inadequacy of the plans." (*Sunbeam Construction Co. v. Fisci, et al.* (1969) 2 Cal.App.3d 181, 184–185 [82 Cal.Rptr. 446].)

- "There is no basis for an implied warranty of fitness of the installation since the work was done in accordance with the plans and specifications supplied by the owner. … 'In other words, as to the refrigerating plant, defendants got precisely what they contracted for, and there was no implied warranty that the machine would answer the particular purpose for which the buyers intended to use it.' " (*The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Cavanaugh, et al*. (1963) 217 Cal.App.2d 492, 508–509 [32 Cal.Rptr. 144].)

- "[T]he contractor's responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell. …" *McConnell v. Corona City Water Co*. (1906) 149 Cal. 60, 63 [85 P. 929].)

Secondary Sources

Miller and Starr, California Real Estate, §29.3 (2010)

4520. Contractor's Claim for Changed or Extra Work

[*Name of plaintiff***] claims that [***name of defendant***] required [him/her/it] to perform [changed/ [or] extra] work beyond that required by the contract. [***Name of plaintiff***] claims that [[he/she/it] should be compensated/ [and] should have been given a time extension] [under the contract].**

To succeed on this claim, [*name of plaintiff***] must prove all of the following:**

1. **That the [changed/ [or] extra] work was [not included in/ [or] in addition to that required under] the original contract;**

2. **That [***name of defendant***] directed [***name of plaintiff***] to perform the [changed/ [or] extra] work;**

3. **That [***name of plaintiff***] performed the [changed/ [or] extra] work; and**

4. **That [***name of plaintiff***] was harmed because [***name of defendant***] required the [changed/ [or] extra] work.**

New December 2010

Directions for Use

This instruction may be used for claims for changed or extra work by the contractor against the owner, or for analogous claims asserted by a subcontractor against the general contractor.

Most construction contracts contain provisions that allow the owner to direct changes in the work and provide that the contractor will be paid and sometimes receive a time extension for performing the changed or extra work. Extra or changed work may under certain circumstances be priced in the contract (e.g., by unit price, or agreed labor rates and material costs, etc.) If so, include "under the contract" in the opening paragraph.

This instruction is based on CACI No. 303, *Breach of Contract – Essential Factual Elements*, and CACI No. 350, *Introduction to Contract Damages*. If the claim is based on an implied contract for the work, CACI No. 305, *Implied-in-Fact Contract*, should also be given.

Sources and Authority

- "Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract." (*C.F. Bolster Co. v. J.C. Boespflug Construction Co.* (1959) 167 Cal.App.2d 143, 151 [334 P.2d 247].)

- "Where the extra work and materials furnished are of the same character as the work and materials named in the contract, the general rule is that they are to be paid for according to the schedule of prices fixed by the contract." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 684 [276 P.2d 52].)

- "Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered." (*C.F. Bolster Co., supra*, 167 Cal.App.2d at p. 151.)

Secondary Sources

Cal.Jur.3d, Building and Construction Contracts (2009), § 26, *Change Orders*.

4521. Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed

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The contract between the parties provided for certain procedures that had to be followed if [*name of plaintiff***] wanted to be paid for changed or additional work that was not required by the contract. These procedures are called "change-order requirements." [The change-order requirements of the contract provide as follows: [***specify***].]**

[*Name of plaintiff*] **seeks additional compensation beyond that provided for in the contract for [***specify, e.g., fill and grading***] because [***specify, e.g., the soil conditions at the project site were not as represented*]. **[***Name of defendant***] claims that [***name of plaintiff***] failed to comply with the contract's change-order requirements, and that therefore [he/she/it] is not entitled to payment for the changed or additional work that [he/she/it] performed.**

To obtain additional compensation, [*name of plaintiff***] must prove that [he/she/it] [followed/was excused from having to follow] the change-order requirements.**

New December 2010

Directions for Use

This instruction should be given if the owner claims that the contract required the contractor to request a change order for any claimed changed or additional work before performing the work as a condition precedent to being permitted to assert a claim for additional compensation. It is an adaptation of CACI No. 321, *Existence of Condition Precedent Disputed, and* CACI No. 322, *Occurrence of Agreed Condition Precedent*.

The owner's claim for strict compliance with the contract's change-order procedures is potentially subject to several recognized defenses, including waiver (see CACI No. 4522, *Waiver of Written Approval or Notice Requirements for Changed or Additional Work*), estoppel, and oral modification (see CACI No. 313, *Modification*; Civil Code, §1698; *Girard v. Bell* (1981) 125 Cal.App.3d 772, 785 [178 Cal.Rptr. 406].) If one of these defenses is asserted, select "was excused from having to follow" in the last paragraph and give the appropriate instruction on the excuse from performance involved.

Sources and Authority

- Civil Code section1698 provides:

  (a) a contract in writing may be modified by a contract in writing;

  (b) a contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by both parties;

(c) unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (section 1624) is required to be satisfied if the contact modified is within its provisions;

(d) nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation, and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts" "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

- "California courts generally have upheld the necessity of compliance with contractual provisions regarding written "change orders". (*Weeshoff Construction Co. v. Los Angeles County Flood Control Dist*. (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19].)

- "Compliance with contractual provisions for written orders is indispensible in order to recover for alleged extra work." (*Acoustics, Inc. v. Trepte Construction* (1971) 14 Cal.App.3d 889, 912 [92 Cal.Rptr. 723].)

- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

Secondary Sources

4522. Waiver of Written Approval or Notice Requirements for Changed or Additional Work

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The contract between the parties required [*name of plaintiff***] [to obtain [***name of defendant***]'s written approval/ to give written notice to [***name of defendant***]] in order to be paid for performing changed or additional work.**

[*Name of defendant***] claims that [***name of plaintiff***] failed to comply with the contract's [written approval/ notice] requirements, and that therefore [***name of plaintiff***] is not entitled to payment for the changed or additional work that [he/she/it] performed. [***Name of plaintiff***] claims that [he/she/it] was not required to comply with the contract's [written approval/ notice] requirement because [***name of defendant***] gave up [his/her/its] right to insist on [written approval/ notice]. Giving up a contract right is called a "waiver."**

To succeed on this waiver claim, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] freely and knowingly gave up [his/her/its] right to require [***name of plaintiff***] to follow the contract's [written approval/ notice] requirements.**

A waiver may be oral or written or may arise from conduct that shows [*name of defendant***] clearly gave up that right.**

New December 2010

Directions for Use

This instruction is a variation of CACI No. 336, *Affirmative Defense—Waiver*. Use of this instruction may be limited to private contract disputes. (See *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 111 [65 Cal.Rptr.3d 762]; cf. *Weeshoff Construction Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 589. [152 Cal.Rptr. 19], [public agency may waive written change order requirements]; see also *City Street Improv. Co. v. Kroh* (1910) 158 Cal. 308, 322–326 [110 P. 933].)

When a contractor asserts a claim for compensation for changed or additional work (See CACI No. 4520. *Contractor's Claim for Changed or Extra Work*), the owner may assert that the contractor is not entitled to payment because it failed to obtain the owner's written approval or failed to give written notice before performing the changed or additional work. (See CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Not Followed*.) The contractor is entitled to counter this defense by showing that the owner expressly or impliedly waived the contract's requirements.

Waiver must be proved by clear and convincing evidence. (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108.) Also give CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Sources and Authority

- Civil Code section 1698 provides:

  (a) A contract in writing may be modified by a contract in writing.

  (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

  (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.

  (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

- " '[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.' … The burden … is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' … The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 [44 Cal.Rptr.2d 370, 900 P.2d 619], internal citations omitted.)

- "It is settled law that the parties may by their conduct waive the requirement of a written contract that no extra work shall be done except upon written order. … 'Waiver may be shown by conduct, and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished.' " (*Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353–355 [2 Cal.Rptr. 871].)

- "Where the terms of a written contract require that extra work be approved in writing, such provision may be altered or waived by an executed oral modification of the contract." (*Healy v. Brewster* (1967) 251 Cal.App.2d 541, 552 [59 Cal.Rptr. 752], internal citations omitted.)

- "[Defendant] places reliance on the provision of the subcontract which provides that any work involving extra compensation shall not be proceeded with unless written authority is given by [defendant]. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that extra work must be approved in writing. The oral request for and approval of extra work by [defendant] was, when fully performed, an oral modification of the written June 8th subcontract. … Whether a written contract has been modified by an executed oral agreement is a question of fact, and the finding, in the instant case, is supported by substantial evidence. … Defendant cannot be heard to say that a written order was not first obtained as required under the subcontract. [Defendant] by its acts and conduct waived and is estopped to rely

upon the subcontract provision requiring its prior written approval before proceeding with work involving extra compensation." (*Isaac & Menke Co. v. Cardox Corp.* (1961)193 Cal.App.2d 661, 669–670, [14 Cal.Rptr. 523], internal citations omitted.)

- "The written contract provided that the defendant should not be charged for 'extras' unless ordered in writing. Upon this basis defendant contends that recovery for the 'extras' furnished by plaintiff is barred. The provision in a building contract that an owner may be charged only for 'extras' which are ordered in writing may be waived or modified by an executed oral agreement. As a consequence, recovery by the contractor for the reasonable value of 'extras' has been upheld where they have been furnished at the request of the owner, became a part of the construction work generally described in the building contract, and are accepted by him, even though the request therefor was oral and the building contract provided that he should be chargeable only for such 'extras' as were requested in writing." (*1st Olympic Corp. v. Hawryluk* (1960) 185 Cal.App.2d 832, 841 [8 Cal.Rptr. 728], internal citations omitted.)

- "Defendants concede that the labor for which payment is sought was actually performed and that the backfill was supplied. They accept the finding that the charges were reasonable, and the record discloses that the benefits of the labor and material have accrued to the premises. Defendants rest their contentions on the provision of the contract requiring written change orders. The parties may, by their conduct, waive such a provision with the result that the subcontractor does extra work without a written order. If the circumstances indicate that the parties intended to waive the provision, the subcontractor will be protected." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 682–683 [276 P.2d 52], internal citations omitted.)

- "The record shows that extras were ordered and approved by [cross-defendant] in the amount of $8,097.50. Under the law this amounted to a modification of the written contract. [Cross-defendant] places great reliance on the provision of the contract which provides that alterations must be in writing, and points out here that he only approved one alteration in writing. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that all changes must be approved in writing. This is so because the executed oral agreement may alter or modify that provision of the contract as well as other portions." (*Miller v. Brown* (1955) 136 Cal.App.2d 763, 775 [289 P.2d 572], internal citation omitted.)

- "The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates. Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in accordance with a previous written agreement." (*Wyman v. Hooker* (1905) 2 Cal.App. 36, 41 [83 P. 79].)

- "California courts generally have upheld the necessity of compliance with contractual

provisions regarding written 'change orders.' … However, California decisions have also established that particular circumstances may provide waivers of written 'change order' requirements. If the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written 'change order' requirement may be waived." (*Weeshoff Constr. Co., supra,* 88 CalApp.3d at p. 589, internal citations omitted.)

- "In addition to being factually inapposite, the continuing viability of ***Weeshoff*** is questionable. In pronouncing that 'California decisions have also established that particular circumstances may provide waivers of written 'change order' requirements,' and '[i]f the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written 'change order' requirement may be waived,' the court cited cases involving private parties, not public agencies…Since its publication 28 years ago, no case has cited *Weeshoff* for this point. This is understandable as it is contrary to the great weight of authority, cited above, to the contrary." (*Katsura, supra,* (2007) 155 Cal.App.4th 104,111 [65 Cal.Rptr.3d 762], internal citation omitted.)

Secondary Sources

4523. Contractor's Claim for Additional Compensation—Abandonment of Contract

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The contract between the parties provided for certain procedures to be followed if [*name of plaintiff***] wanted to be paid for changed or additional work that was not initially required by the contract. These procedures are called "change-order requirements."**

[*Name of plaintiff***] claims that the [***name of defendant***] required many changes and that the parties consistently ignored the contract's change-order requirements. Therefore, [***name of plaintiff***] claims that the contract was abandoned and that the change-order requirements no longer applied.**

To establish this claim, [*name of plaintiff***] must prove the following:**

1. **That the parties through their conduct consistently disregarded the contract's change-order requirements; and**

2. **That the scope of work under the original contract had been altered by the changes so much that the final project was significantly different from the original project.**

New December 2010

Directions for Use

This instruction is a contractor's response if the owner asserts that the contractor is not entitled to additional compensation for changed or additional work. (See CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Not Followed*). It should be given if the contractor claims that through their conduct, the parties acted in a manner that indicated that they had entirely abandoned their original contract.

For instructions on damages after it has been established that the contract was abandoned, see CACI No. 4541, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery*, and CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

This instruction may not be used against a public entity. A contractor may not claim that a public entity has abandoned the applicable contract change order procedures on a project subject to competitive bidding in such a way as to increase the contract price as doing so would violate the public policy regarding competitive bidding. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239 [115 Cal.Rptr.2d 900, 38 P.3d 1120].)

Sources and Authority

- "[T]his court has not generally allowed quantum meruit recovery for extra work performed beyond the contract requirements." (*Amelco Electric, supra,* 27 Cal.4th at p.

234.)

- "[W]hen an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 640 [218 Cal.Rptr. 592].)

- "Abandonment of a contract may be implied from the acts of the parties. Abandonment of the contract can occur in instances where the scope of the work when undertaken greatly exceeds that called for under the contract. … In the instant case the parties consistently ignored the procedures provided by the contract for the doing of extra work." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 [92 Cal Rptr. 120], internal citation omitted.)

- "Under the abandonment doctrine, once the parties cease to follow the contract's change order process, and the final project has become materially different from the project contracted for, the entire contract—including its notice, documentation, changes and cost provisions—is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all of its work. Were we to conclude such a theory applied in the public works context, the notion of competitive bidding would become meaningless." (*Amelco Electric, supra,* 27 Cal.4th at p. 239.)

Secondary Sources

4524. Contractor's Claim for Compensation Due Under Contract—Substantial Performance

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[*Name of defendant***] claims that [***name of plaintiff***] did not fully perform all of the things that [he/she/it] was required to do under the [terms of the contract/plans and specifications], and therefore [***name of defendant***] did not have to [***specify owner's obligations under the contact, e.g. pay the contract balance***]. [***Name of plaintiff***] claims that [he/she/it] did substantially all of the things required of [him/her/it] under the contract.**

To succeed, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] made a good-faith effort to comply with the terms of the contract and did not willfully depart from them;**

2. **That [***name of plaintiff***] did not omit any essential requirement in the contract; and**

3. **The [***name of defendant***] received essentially what the contract called for because [***name of plaintiff***]'s failures, if any, were so trivial or unimportant that they could have been easily fixed.**

If you find that [*name of plaintiff***] substantially performed the contract, the cost of completing unfinished work must be deducted from the contract price.**

New December 2010

Directions for Use

This instruction is a variation of CACI No. 312, *Substantial Performance*. It should be used if the issue is whether the contractor performed all of the requirements of the construction contract, including the plans and specifications. If the owner withholds some or all of the contract price because it claims that the contractor did not perform the work completely or correctly, the contractor may assert that it "substantially performed" under this instruction.

Sources and Authority

- " 'At common law, recovery under a contract for work done was dependent upon complete performance, although hardship might be avoided by permitting recovery in *quantum meruit*. The prevailing doctrine today, which finds its application chiefly in building contracts, is that *substantial performance* is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no willful [sic] departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated,

so that the promisee may get practically what the contract calls for.' " (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 186–187 [14 Cal.Rptr. 297, 363 P.2d 313], original italics, internal citation omitted.)

- " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769], internal citation omitted.)

- "What constitutes 'substantial performance' 'is always a question of fact, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance.' " (*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 672 [143 Cal.Rptr. 570], internal citation omitted.)

- " 'Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' " (*Connell, supra*, 170 Cal. at pp. 556–557, internal citation omitted.)

- "'The general rule on the subject of [contractual] performance is that '[w]here a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy.' [Citation.] … [I]t is settled, especially in the case of building contracts where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance. [Citations.]' " (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal App 4th 1279, 1291-1292 [71 Cal.Rptr.3d 317].)

- " '[T]here is a substantial performance where the variance from the specifications of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied without great expenditure and without material damage to other parts of the structure, but that the defects must not run through the whole work so that the object of the owner in having the work done in a particular way is not accomplished, or be such that a new contract is not substituted for the original one, nor be so substantial as not to be capable of a remedy and the allowance out of the contract price will not give the owner essentially what he contracted for.' " (*Murray's Iron Works, Inc., supra,* 158

Cal.App.4th at p. 1292.)

- "The rule of substantial performance was intended to cover situations where the defects are slight or trivial, or where the imperfections do not affect a substantive part of the work, but it was not intended to cover cases where the departures or deviations from the plans are major, where it takes a major operation to remedy the defects, or where the work as constructed is of no real value." (*Bause v. Anthony Pools, Inc*. (1962) 205 Cal. App.2d 606, 613 [23 Cal.Rptr. 265].)

- "[A]lthough in a few minor and trivial matters the building did not strictly and technically comply with the terms of the contract, the departure was not willful nor intentional on the part of the defendant, and the defects were capable of being easily remedied to conform to the terms of the contract … . Thereupon the court concluded that the defendant was entitled to have the contract enforced in his favor, with an abatement … on the contract price on account of the defects found to exist … ." (*Rischard v. Miller* (1920) 182 Cal. 351, 352–353 [188 P. 50].)

- "[The] performance rendered may be held to be less than substantial by reason of the accumulation of many defects, any one of which standing alone would be minor in character.' " (*Tolstoy Constr. Co., supra,* 78 Cal.App.3d at pp. 671–673, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 818-819

13 California Forms of Pleadings and Practices, Ch. 140, Contracts § 140.23 (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts §§ 50.30, 50.31 (Matthew Bender)

27 California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, Suing or Defending Action for Breach of Contract, 22.08[2], 22.16[2], 22.37, 22.69.

4530. Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract

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If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for failure to properly build the [project/***describe construction project, e.g., apartment building***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

To recover damages, [*name of plaintiff***] must prove the reasonable cost of repairing the [project/***short term for project, e.g., building***] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.**

If, however, [*name of defendant***] proves that the cost of repair is unreasonable in light of the damage to the property and the property's value after repair, then [***name of plaintiff***] is entitled only to the difference between the value of the [project/***short term for project, e.g., remodeling***] as it was performed by [***name of defendant***] and what it would be worth if it had been completed according to contract, including the plans and specifications, agreed to by the parties. The cost of repair may be unreasonable if the repair would require the destruction of a substantial part of [***name of defendant***]'s work.**

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to meet the requirements of the contract or its plans, and specifications. If the owner claims that the contractor breached the contract by failing to complete all work required by the contract, see CACI No. 4531, *Owner's Damages for Breach of Construction Contract—Failure to Complete Work.*

The basic measure of damages is the cost of repair to bring the project into compliance with the contract. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev.* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802].) However, the contractor may attempt to prove that the cost of repair is unreasonable in light of the damage to the property and the value of the property after repair. (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193]; see *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817] [burden of proof on contractor].) If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell, supra,* 164 Cal.App.2d at pp. 360–361.)

There is no cap, however, at diminution of value. The cost of repair may be awarded even if greater than diminution in value if the owner has a personal reason for wanting to repair and the costs are not unreasonable in light of the damage to the property and the value after repair (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193].)

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to*

Real Property (Economic Damage). For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- Civil Code section 3359 provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

- "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Elrich v. Menzes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886].)

- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' (*Glendale Fed. Sav. & Loan Assn., supra,* 66 Cal.App.3d at pp. 123–124 , internal citations omitted.)

- "[E]ven where the repair costs are reasonable in relation to the value of the property, those costs must also be reasonable in relation to the harm caused. Here the trial court's finding that fill settlement was likely to continue and the [plaintiff]s' appraiser's opinion the home was worth only $ 67,500 in its present condition, suggest the damage sustained was indeed significant. Plainly this is not a case where the tortfeasors' conduct improved the value of the real property or only diminished it slightly. Rather we believe where, as here, the damage to a home has deprived it of most of its value, an award of substantial repair costs is appropriate." (*Orndorff, supra,* 217 Cal.App.3d at pp. 690–691.)

- "[T]he defendant did not prove, or offer to prove, the other factors of the American Jurisprudence rule, to wit: 'a substantial part of what has been done must be undone.' To the contrary, defendant's expert witness … testified that it would not be necessary to undo any of the work. [¶] As quoted, Professor Corbin argues that the burden is on the defendant to affirmatively and convincingly prove that economic waste would result from the replacement of the omissions and defects. In all fairness this would appear proper as it is the defendant who is seeking to prove a situation whereby he will get equitable relief from a rule of law. The same reasoning would apply as to proof that a substantial part of what has been done must be undone." (*Shell, supra,* 164

Cal.App.2d at p. 366.)

Secondary Sources

11 Miller & Star, California Real Estate (3d ed. 2009) §29:10

Am. Jur. 2d, Building and Construction Contracts (2000 ed,) §84 et seq.

24 Williston 4th §66:14 et seq.

4531. Owner's Damages for Breach of Construction Contract—Failure to Complete Work

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If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***] for failure to complete the [project/***describe construction project, e.g., kitchen remodeling***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

To recover damages, [*name of plaintiff***] must prove the reasonable cost of completing the [project/***short term for project, e.g., remodeling***] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.**

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to complete all the work required by the contract. For an instruction for use if the owner claims that the contractor breached the contract by failing to complete the work in conformity with the contract, see CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract.*

The basic measure of damages for failing to complete a construction project is ordinarily the reasonable cost to the owner of completing the work. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123 [135 Cal.Rptr. 802].) With regard to defective or nonconforming work, the contractor may attempt to prove that the cost or repair is unreasonable in light of the damage to the property and the value of the property after repair. If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817]; see also *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193] [cost of repair may exceed diminution in value if owner has personal reason for wanting repairs].)

No reported case has been found that applies a reasonableness limitation on the cost of completing a contract, though the Restatement Second of Contracts requires that the cost of completion not be clearly disproportionate to the probable loss in value. (See Restatement 2d of Contracts, § 348(2).) The last paragraph of CACI No. 4530 may be adapted to provide for a reasonableness limitation on cost of repair. There may, however, be different concerns with the cost of completing a contract as opposed to the cost of repairing construction defects. It might be argued that the owner is entitled to have the work completed as required by the contract, regardless of any unexpected increases in the cost of completion.

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to Real Property (Economic Damage).* For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- Civil Code section 3359 provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

- "The measure of damages for breach of contract to construct improvements on real property where the work is to be done on plaintiff's property is the reasonable cost to the plaintiff to finish the work in accordance with the contract." (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 993 [149 Cal.Rptr. 119].)

- "Although the defendants inferentially contend to the contrary, the plaintiff was entitled to recover damages from them for their breach of the contract even though [plaintiff] had not completed the work in question." (*Fairlane Estates, Inc. v. Carrico Constr. Co.* (1964) 228 Cal.App.2d 65, 72–73 [39 Cal.Rptr. 35].)

- Restatement Second of Contracts, section 348(2) provides: "If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on: (a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him."

Secondary Sources

11 Miller & Star, California Real Estate (3d ed. 2009) §29:10

Am. Jur. 2d, Building and Construction Contracts (2000 ed,.) §84 et seq.

24 Williston 4th §66:14 et seq.

4532. Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by failing to [substantially] complete the [project/***describe construction project, e.g., apartment building***] by the completion date required by the contract. If you find that [***name of plaintiff***] has proven this claim, the parties' contract calls for damages in the amount of $ _____ for each day between [***insert contract completion date***] and the date on which the project was [substantially] completed. You will be asked to find the date on which the project was [substantially] completed. I will then calculate the amount of damages.**

[If you find that [*name of plaintiff***] granted or should have granted time extensions to [***name of defendant***], you will be asked to find the number of days of the time extension and add these days to the completion date set forth in the contract. I will then calculate [***name of plaintiff***]'s total damages.]**

New December 2010

Directions for Use

This instruction should be used when the owner seeks to recover liquidated damages against the contractor for delay in completing the project under a provision of the contract. Include the optional second paragraph if there is a dispute over whether the contractor is entitled to an extension of time. Give CACI 4520, *Contractor's Claim for Changed or Extra Work,* to guide the jury on how to determine if the contractor is entitled to a time extension for extra work. A special instruction may be required to guide the jury on how to determine if the contractor is entitled to a time extension for excusable or compensable delays.

Include "substantially" throughout if there is a dispute of fact as to when the project should be considered as finished. Unless otherwise defined by the contract to mean actual completion or some other measure of completion (see, e.g., *London Guarantee & Acci. Co. v. Las Lomitas School Dist* (1961) 191 Cal.App.2d 423, 427 [12 Cal.Rptr. 598]), "completion" for the purpose of determining liquidated damages ordinarily is understood to mean "substantial completion." (See *Vrgora v. L.A. Unified Sch. Dist.* (1984) 152 Cal.App.3d 1178, 1186 [12 Cal.Rptr. 598]; see generally *Perini Corp. v. Greate Bay Hotel & Casino, Inc.* (N.J. 1992) 129 N.J. 479, 500–501, overruled on other grounds in *Tretina v. Fitzpatrick & Assocs.* (N.J. 1994) 135 N.J. 349, 358 [discussing standard practices in the construction industry].)

There are few or no general principles set forth in California case law as to what may constitute substantial completion. It would seem to be dependent on the unique facts of each case. (See, e.g., *Continental Illinois Nat'l Bank & Trust Co. v. United States* (Ct. Cl. 1952) 121 Ct.Cl. 203, 243–244.) The related doctrine of substantial performance, which allows the contractor to obtain payment for its work even if there are some minor or trivial deviations from the contract requirements, may perhaps be looked to for guidance for when a project is substantially complete for purposes of stopping the running

of the clock on liquidated damages. (See CACI No. 4524, *Substantial Performance*.) But they are separate doctrines. Substantial performance focuses on *what* was done. Substantial completion focuses on *when* it was done. (See *Hill v. Clark* (1908) 7 Cal.App. 609, 612 [95 P. 382] [only substantial performance, not substantial completion was at issue].)

If the liquidated damages provision is found to be unenforceable because its enforcement would constitute a penalty rather than an approximation of actual damages that are difficult to ascertain, the owner may be entitled to recover its general and special damages, as those damages are defined in CACI No. 350, *Introduction to Contract Damages,* and CACI No. 351, *Special Damages, including Lost Profits*.

Sources and Authority

- Civil Code section 1671(b) provides: "Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

- Public Contract Code section 10226 provides: "Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made. A contract for a road project, flood control project, or project involving facilities of the State Water Resources Development System may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, the provision, if used, to be included in the specifications and to clearly set forth the basis for the payment."

- "Liquidated damage clauses in public contracts are frequently validated precisely because delay in the completion of projects such as highways 'would cause incalculable inconvenience and damage to the public.' … Thus, it is accepted that damage in the nature of inconvenience and loss of use by the public are real but often, as a matter of law, not measurable." (*Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 782–783 [181 Cal.Rptr. 332], internal citations omitted.)

- "[I]n the absence of a contractual provision for extensions of time, the rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay to which he has contributed, even though the contractor has caused some or most of the delay. … Acceptance of the reasoning urged by defendant would mean that, solely because there has been noncompliance with an extension-of-time provision, the position of an owner could be completely changed so that he could withhold liquidated damages for all of the period of late completion even though he alone caused the delay." (*Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241, 245 [28 Cal.Rptr. 714, 379 P.2d 18], internal citation omitted.)

- "[A]cceptance may not be arbitrarily delayed to the prejudice of a contractor, and work should be viewed as accepted when it is finished even though a governmental body specifies a later date." (*Peter Kiewit Sons' Co., supra*, 59 Cal.2d at p. 246.)

- "Lacking any authority, appellant asserts 'that something is wrong here' and '[it] does not make sense to compensate the owner for the loss of use of something that it is actually using.' For all practical purposes, we perceive appellant as attempting to invoke the equitable doctrine of unjust enrichment and therein seek a setoff. The No. 1 problem with the applicability of said theory is that although [defendant] may have benefitted by using the facility, the fact that the facility had not been fully or even substantially completed suggests that the enrichment obtained is de minimis or is at best undefinable." (*Vrgora, supra,* 152 Cal.App.3d at p. 1186, footnote omitted.)

- "Was the contract completed on September 5, 1953? The trial court did not find that the building was completed on that date. It found that it was 'substantially completed.' On September 8, 1953, the uncontradicted evidence shows that some of the class rooms were insufficiently complete to be used; the plumbing was not complete; and the fencing of the playground had not been started. There were workmen in the building and there was grading equipment in the yard area. The salary of the inspector for the school district, who was required by state law, had to be paid until October 22, 1953. The inspector's report made on September 1, 1953, showed that the work was 94 per cent complete as of that time. His report made on September 16, 1953 showed the work to be 96 per cent complete. On September 16 there was admittedly about $ 9,800 worth of work yet to be done. The contract called for a complete building and not a substantially complete one. [¶] The fact that the school district occupied portions of the building on September 8, 1953, does not change the situation. [The contract] provides that occupancy of any portion of the building ' … shall not constitute an acceptance of any part of the work, unless so stated in writing by the Board of the District.' The board of the district did not so state." (*London Guarantee & Acci. Co., supra*, 191 Cal.App.2d at pp. 426-427.)

- "In *London Guar. & Acc. Co. v. Las Lomitas School Dist., supra,* 191 Cal.App.2d 423, the appellate court reviewed the efficacy of an 'adjusted' liquidated damages award by the trial court on the basis of the date of 'substantial completion' as opposed to 'actual completion.' … The appellate court reversed the trial court's judgment, finding no validity to the argument employed at trial, that once the contractor had substantially performed his obligation (96 percent completion of the building), the school district was not entitled to liquidated damages. In effect, the court held that since the parties contracted for 'actual' performance in the form of a '. . . complete building and not a substantially complete one', liquidated damages were appropriate." (*Vrgora v. L.A. Unified Sch. Dist.* (1984) 152 Cal.App.3d 1178, 1187 [12 Cal.Rptr. 598].)

- "We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: 'Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?" The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no reference thereto; and the court finding that the contract was substantially completed, there was no

room for inquiry as to the damages, and no prejudice could result to defendant from such ruling." (*Hill v. Clark* (1908) 7 Cal.App. 609, 612 [95 P. 382].)

- "Finding 51 shows that the work … was 99.6% complete on December 30, as of which day liquidated damages began, and that the only work remaining to be done had to do with the boiler house equipment, and certain 'punch list items' which are usually minor adjustments which recur for an indefinite time after the completion of an extensive building project. The boiler house work would, apparently, not have interfered with the occupancy of the houses by tenants, and tenants in new houses expect to be troubled for a while by adjustments due to tests. Two hundred dollars a day was a severe penalty for so slight an asserted delinquency and our observation of other cases tells us that it is not customary to draw the line so strictly. The refusal, which we hold unjustified, of the Government to accept the project on December 30, 1936, subjected the contractor, not only to the liquidated damages discussed above, but to continued expenditures for coal, light, power and fire insurance in the amount of $2,454.75. The plaintiff may recover this amount. (*Continental Illinois Nat'l Bank & Trust Co. v. United States* (Ct. Cl. 1952) 121 Ct.Cl. 203, 243–244.)

Secondary Sources

Am. Jur. 2d, Building and Construction Contracts (2004 ed.) §93 et seq.

Miller & Starr, California Real Estate (3d ed. 2009) § 27:41

5 Bruner & O'Connor, Construction Law (2010) §15:15.

4540. Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work

[*Name of plaintiff***] contends that [***name of defendant***] increased or changed the scope of the [project/***describe construction project, e.g., apartment building***] beyond what was required by the parties' contract. If you find that [***name of plaintiff***] is entitled to compensation for this extra work, you may award damages to [***name of plaintiff***] based on [the parties' agreed price for /the reasonable value of] the extra work.**

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for extra work that the owner required that was not provided for in the contract. In the last sentence, give the first alternative if there was evidence that the parties agreed, in writing or otherwise, on compensation for the extra work. Otherwise give the second option for the reasonable value of the work.

Under very limited circumstances, the contractor may obtain a "total cost" recovery for extra work, meaning that instead of proving the costs associated with all of the changes, the contractor computes the total cost of the project and subtracts the contract price. For an instruction on total-cost recovery, see CACI No. 4541, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery*.

Under other circumstances, the contractor may attempt to establish that the contract was mutually abandoned and that the recovery should be in quantum meruit. For an instruction on damages on abandonment, see CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- "Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract. Extra work may be performed by the contractor for the owner or by the subcontractor for the general contractor, Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered." (*C. F. Bolster Co. v. J. C. Boespflug Constr. Co.* (1959) 167 Cal.App.2d 143, 151 [334 P.2d 247], internal citations omitted.)

- "Whether a contractor is entitled to additional compensation for extra work depends generally on the construction of the particular contract and whether it is included in the contract price. The construction placed on the contract by the parties is of great weight, and where they agree on

additional compensation for certain work it precludes a claim that the original contract requires the performance of such work." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 683 [276 P.2d 52].)

Secondary Sources

4541. Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by increasing or changing the scope of the [project/***describe construction project, e.g., apartment building***] beyond what was required by the contract. [***Name of plaintiff***], therefore, seeks to recover the total cost of all of [his/her/its] work on the [project/***e.g., apartment building***].**

In order to recover the total cost of all of [his/her/its] work, [*name of plaintiff***] must prove all of the following:**

1. **That the scope of work under the original contract had been altered by the changes so much that the final project was significantly different from the original project.**

2. **That because of the scope of the changes, it is not practical to prove the actual additional costs caused by each change demanded by [***name of defendant***];**

3. **That [***name of plaintiff***]'s original bid that was accepted by [***name of defendant***] was reasonable;**

4. **That [***name of plaintiff***]'s actual costs were reasonable; and**

5. **That [***name of plaintiff***] was not responsible for incurring the additional costs.**

If you find that [*name of plaintiff***] has established all of the above, determine [***name of plaintiff***]'s damages by subtracting the contract price from the total cost of [***name of plaintiff***]'s performance of the work.**

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner if the contractor claims that changes demanded by the owner were such that damages must be measured by computing the total cost to the contractor to complete the contract minus the contract price. (Cf. CACI No. 4540, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work*.) The difference is then considered to be the costs associated with all of the changes. For an instruction on quantum meruit recovery under the related but different theory of contract abandonment, see CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- "Under [the total-cost] method, damages are determined by 'subtracting the contract amount from the total cost of performance.' " (*Amelco Elec. v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243 [115 Cal.Rptr.2d 900, 38 P.3d 1130].)

- "Although the total cost theory of proving damages in a contract case is not generally favored, under proper safeguards and where there is no better proof it has been upheld." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 646 [218 Cal.Rptr. 592].)

- "This [total cost recovery] method may be used only after the trial court determines the following can be shown: (1) it is impractical for the contractor to prove actual losses directly; (2) the contractor's bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs. If some of the contractor's costs were unreasonable or caused by its own errors or omissions, then those costs are subtracted from the damages to arrive at a modified total cost. 'If prima facie evidence under this test is established, the trier of fact then applies the same test to determine the amount of total cost or modified total cost damages to which the plaintiff is entitled.' " (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1408 [106 Cal.Rptr.3d 691], internal citations omitted.)

- " 'The total cost method is not a substitute for proof of causation,' and 'should be applied only to the smallest affected portion of the contractual relationship that can be clearly identified.' As the United States Court of Appeals for the Federal Circuit has stated, 'Clearly, the 'actual cost method' is preferred because it provides the court … with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor.' " (*Amelco Elec., supra,* 27 Cal.4th at p. 244, internal citations omitted.)

- "We conclude [plaintiff] failed to adduce substantial evidence to warrant instructing the jury on the four-part total cost theory of damages. In particular, [plaintiff] failed to adduce evidence to satisfy at least the fourth element of the four-part test, i.e., that it was not responsible for the added expenses. A corollary of this element of the test is that the contractor must demonstrate the defendant, and not anyone else, is responsible for the additional cost." (*Amelco Elec., supra,* 27 Cal.4th at p. 245.)

- "[W]e do not determine whether total cost damages are ever appropriate in a breach of public contract case … ." (*Amelco Elec., supra,* 27 Cal.4th at p. 242.)

Secondary Sources

4542. Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery

[*Name of plaintiff*] claims that the parties consistently disregarded the contract's change-order process and that the final project was significantly different from the original project. If you find that the parties abandoned the contract, [*Name of plaintiff*] is entitled to recover the reasonable value of all of [his/her/its] work on the project rather than the contract price.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner if the contractor's claim is that the parties effectively abandoned the contract, and that the contractor should therefore receive a quantum meruit measure of damages for the reasonable value of its work. (See CACI No. 4523, *Contractor's Claim for Additional Compensation—Abandonment of Contract*.)

Contract abandonment cannot be alleged with regard to a public works contract. (*Amelco Elec. v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 238–239 [115 Cal.Rptr.2d 900, 38 P.3d 1130].)

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- "[O]nce the parties cease to follow the contract's change order process, and the final project is materially different from the project contracted for, the contract is deemed inapplicable or abandoned and is set aside. The plaintiff may then recover the reasonable costs for all of its work." (*Amelco Elec., supra,* 27 Cal.4th at p. 238.)

- "The contractor was … entitled, under the factual circumstances of this case [abandonment], to recover the reasonable value of the work it performed on a quantum meruit basis, without being limited by the original contract amount." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 639 [218 Cal.Rptr. 592].)

- "In the specific context of construction contracts …, it has been held that when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found. In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. Although the *contract* may be abandoned, the *work* is not." (*C. Norman Peterson Co., supra,* 172 Cal.App.3d at p. 640, original italics, internal citations omitted.)

- "There was a triable issue of fact as to whether these changes for which plaintiff was seeking compensation were required. Moreover, because of the tremendous number of changes, there was an issue as to whether the contract had been abandoned by the parties and they proceeded apart from the contract. There was evidence that the job was completely redesigned after the contract

was entered into." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 [92 Cal.Rptr. 120].)

- "[A]bandonment requires a finding that *both* parties intended to disregard the contract, and abandonment may be implied from the acts of the parties." (*C. Norman Peterson Co., supra*, 172 Cal.App.3d at p. 643, original italics.)

- " 'Once the plaintiff has established the amount which he has been induced to expend, the defendant must show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract.' " (*C. Norman Peterson Co., supra*, 172 Cal.App.3d at p. 647.)

Secondary Sources

4543. Contractor's Damages for Breach of Construction Contract—Owner-Caused Delay or Acceleration

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by [delaying/accelerating] [***name of plaintiff***]'s work, causing [***name of plaintiff***] harm. If you find that [***name of defendant***] [delayed/accelerated] the work, you may award damages to [***name of plaintiff***] for all harm caused by the [delay/acceleration], including the following:**

1. **Expenditures that [***name of plaintiff***] made for labor, services, equipment or materials that [he/she/it] would not have otherwise have made but for the [delay/acceleration];**

2. **Overhead [***name of plaintiff***] would not have otherwise incurred but for the [delay/acceleration]; and**

3. **Increase in the cost of labor, services, equipment or materials already required under the contract that resulted from the [delay/acceleration].**

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner either delayed or demanded acceleration of the work.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series, particularly CACI No. 351, *Special Damages*.

Sources and Authority

- Public Contract Code, section 7102 provides in part: "Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee's liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor."

- "Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other jobs, but for the delay, would have been obtained to absorb such overhead." (*Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)

- "[A] contractor cannot recover on a claim for unabsorbed office overhead where it is able to meet the original contract deadline or finish early despite a government-caused delay. An exception applies where the contractor demonstrates from the outset an intent to complete the work early, a capacity to do so, and a likelihood of early completion but for the government's delay. Application

of the three-prong test requirement … , however, is required only where the contractor finishes the work by the original specified contract completion date or earlier." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 52–55, [83 Cal.Rptr.2d 590].)

Secondary Sources

4544. Contractor's Damages for Breach of Construction Contract—Inefficiency Because of Owner Conduct

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by [delaying/disrupting/ [or] interfering] with [***name of plaintiff***]'s work, causing [***name of plaintiff***]'s work to be less efficient than it would have been. If you find that [***name of defendant***] [delayed/disrupted/ [or] interfered] with [***name of plaintiff***]'s work, you may award damages to [***name of plaintiff***] for all harm caused by the [delay/disruption/ [or] interference], including damages for lost profits.**

You may also award damages for lost profits that [*name of plaintiff***] would have received from other jobs but for the [delay/disruption/ [or] interference]. To recover damages for lost profits, [***name of plaintiff***] must prove the following:**

1. **That it is reasonably certain that [***name of plaintiff***] would have earned those profits but for [***name of defendant***]'s [delay/disruption/ [or] interference]; and**

2. **That it was [actually foreseen/reasonably foreseeable] at the time the parties entered into the contract that [***name of plaintiff***] would have earned those profits;**

The amount of lost profits must be proved to a reasonable certainty. Damages for lost profits that are speculative or remote cannot be recovered.

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Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner delayed, disrupted, or interfered with the contractor's work in a way that caused the contractor calculable economic loss.

Lost profits from other work that the contractor could have earned but for the owner's breach are special damages, which must have been either actually foreseen or reasonably foreseeable to the parties at the time when the contract was entered into. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 977 [22 Cal.Rptr.3d 340, 102 P.3d 257].) In element 2, select either "actually foreseen" or "reasonably foreseeable" depending on what was communicated when the contract was signed.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series. See particularly CACI No. 351, *Special Damages*.

Sources and Authority

- "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if

the evidence shows, with reasonable certainty, both their occurrence and extent. It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson v. Bank of Am.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)

- "Unearned profits can sometimes be used as the measure of general damages for breach of contract. Damages measured by lost profits have been upheld for breach of a construction contract when the breaching party's conduct prevented the other side from undertaking performance. The profits involved in [the cases cited], however, were purely profits unearned on the very contract that was breached." (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 971, internal citations omitted.)

- "Lost profits, if recoverable, are more commonly special rather than general damages, and subject to various limitations. Not only must such damages be pled with particularity, but they must also be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' 'When the contractor's claim is extended to profits allegedly lost on *other* jobs because of the defendant's breach' that 'claim is clearly a claim for special damages.' " (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 975, original italics, internal citations omitted.)

- "It is indisputable that the [defendant]'s termination of the school construction contract was the first event in a series of misfortunes that culminated in [plaintiff]'s closing down its construction business. Such disastrous consequences, however, are not the natural and necessary result of the breach of every construction contract involving bonding. Therefore, … lost profits are not general damages here. Nor were they actually foreseen or foreseeable as reasonably probable to result from the [defendant]'s breach. Thus, they are not special damages in this case." (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 977.)

- "As to the reasonableness of the assumptions underlying the experts' lost profit analysis, criticisms of an expert's method of calculation is a matter for the jury's consideration in weighing that evidence. 'It is for the trier of fact to accept or reject this evidence, and this evidence not being inherently improbable provides a substantial basis for the trial court's award of lost profits …' " (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 489–490 [54 Cal.Rptr.2d 888], internal citations omitted.)

- "Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other jobs, but for the delay, would have been obtained to absorb such overhead." (*Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)

Secondary Sources